

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA A. DEMELLO

No. C-06-4711 MHP

Plaintiff,

v.

**MEMORANDUM & ORDER**  
**Re: Motion for Summary**  
**Judgment**

MICHAEL J. ASTRUE,  
Commissioner of Social Security Administration,

Defendant.

Plaintiff Cynthia A. Demello seeks judicial review, pursuant to 42 U.S.C. section 405(g), of the Commissioner of Social Security's finding that plaintiff is not due benefits for her alleged incapacity to work. Now before the court are plaintiff's appeal of that decision and her motion for summary judgment and defendant's motion to remand.. This action was deemed submitted on the papers. Having considered the parties' submissions, and for the reasons set forth below, the court enters the following memorandum and order.

**BACKGROUND**<sup>1</sup>

I. **Factual History**

Plaintiff was severely injured on July 21, 2002 while cleaning her hot tub. Thereafter, plaintiff began walking with a cane or walker and was taking various prescription medications,

1 including Vicodin, anti-inflammatory medication, Paxil and Valium. She continued working for the  
2 Sheriff's Department for about a month after her fall before seeing a nurse practitioner at Kaiser  
3 Permanente, who suggested that she take time off of work. Plaintiff returned to work and worked  
4 half-days in January 2003. However, due to her medical issues, she was only able to continue  
5 working until February 2003.

6 On July 2, 2003, after numerous medical evaluations, plaintiff underwent lower back  
7 surgery. Medical records indicate that plaintiff continued to suffer chronic lower back pain several  
8 months after the surgery. In March 2004 plaintiff was granted disability retirement from the  
9 Alameda County Sheriff's Department. On December 2, 2004 plaintiff underwent a total left knee  
10 replacement. Afterwards, medical records indicate that plaintiff's knee pain persisted through at  
11 least January 2, 2006.

12 In an evaluation dated January 31, 2006, Dr. Wilcox of Kaiser Permanente Physical  
13 Medicine and Rehabilitation found that plaintiff could not stand or sit for more than ten minutes at a  
14 time.<sup>2</sup> Plaintiff's treating physician Dr. Lim-Young confirmed in a letter dated March 30, 2006 that  
15 plaintiff was unable to stand or sit long enough to maintain employment and the failed back surgery  
16 left her permanently disabled. Additionally, plaintiff must lie down for a significant portion of the  
17 afternoon and evening and is awakened by pain between ten and twenty times per night.

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19 II. Procedural History

20 Plaintiff originally filed for social security benefits on September 25, 2003, and her request  
21 was subsequently denied. That decision became final when the Appeals Council declined to review  
22 a denial by the Administrative Law Judge ("ALJ") on June 30, 2006. Plaintiff timely filed for  
23 review of the Social Security Administration's ("SSA") proceedings with this court.

24 Before the ALJ, plaintiff testified to the facts described above. The testimony of plaintiff's  
25 domestic partner, Sharon Tamala, corroborated that of plaintiff. Tamala added that she had lived  
26 with plaintiff for over twenty years and that plaintiff had been forced to significantly curtail her  
27 physical activities after suffering the injuries at issue. Tamala further testified that the injuries and  
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1 resulting pain have seriously altered hers and plaintiff's lifestyles. The parties agree that the ALJ  
2 discounted plaintiff's testimony without specific, cogent reasons elucidated for doing so.  
3 Additionally, the ALJ simply failed to consider Tamala's testimony in his denial of plaintiff's  
4 request for benefits.

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6 LEGAL STANDARD

7 Summary judgment is proper when the pleadings, discovery and affidavits show that there is  
8 "no genuine issue as to any material fact and that the moving party is entitled to judgment as a  
9 matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the  
10 case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is  
11 genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving  
12 party. Id. The party moving for summary judgment bears the burden of identifying those portions  
13 of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material  
14 fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party  
15 will have the burden of proof at trial, the moving party need only point out "that there is an absence  
16 of evidence to support the nonmoving party's case." Id.

17 Once the moving party meets its initial burden, the nonmoving party must go beyond the  
18 pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a  
19 genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving  
20 party's allegations. Id.; Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir.  
21 1994). The court may not make credibility determinations, and inferences to be drawn from the  
22 facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New  
23 Yorker Magazine, 501 U.S. 496, 520 (1991); Anderson, 477 U.S. at 249.

24 The moving party may "move with or without supporting affidavits for a summary judgment  
25 in the party's favor upon all [claims] or any part thereof." Fed. R. Civ. P. 56(a). "Supporting and  
26 opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be  
27 admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the  
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1 matters stated therein.” Fed. R. Civ. P. 56(e).

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3 DISCUSSION

4 In the context of social security hearings, failure to provide specific, cogent reasons for  
5 discounting a witness’ testimony is reversible error. Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th  
6 Cir. 2005); Lewis v. Apfel, 236 F.3d 503, 510–11 (9th Cir. 2001). Such improperly discounted  
7 evidence is “credited as a matter of law.” Moses v. Barnhart, 33 Fed. Appx. 888, 890 (9th Cir.  
8 2002) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996)). This court has discretion to  
9 remand such a case for either further development of the record or to remand for an award of  
10 benefits. Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). Remanding for an award of  
11 benefits is proper where “(1) the ALJ has failed to provide legally sufficient reasons for rejecting  
12 such evidence, (2) there are no outstanding issues that must be resolved before a determination of  
13 disability can be made, and (3) it is clear from the record that the ALJ would be required to find that  
14 claimant disabled were such evidence credited.” Id.; see also Moisa v. Barnhart, 367 F.3d 882, 887  
15 (9th Cir. 2004); Schneider v. Commissioner, 223 F.3d 968, 976 (9th Cir. 2000). Put simply, “We  
16 may direct an award of benefits where the record has been fully developed and where further  
17 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292.

18 The parties agree that the ALJ committed legal error in rejecting plaintiff’s testimony  
19 without supplying specific, cogent reasons for discrediting the evidence. Plaintiff urges the court to  
20 credit that evidence as a matter of law. Plaintiff further argues that crediting this testimony leaves  
21 no issue for further determination by the ALJ.

22 Both parties acknowledge the inconsistency in the ALJ’s finding that plaintiff’s residual  
23 functional capacity is extremely limited but that she remains capable of performing her past relevant  
24 work. However, the parties differ on how the court should reconcile these mutually exclusive  
25 findings. Plaintiff would have the court affirm the ALJ’s finding regarding plaintiff’s limited  
26 residual function capacity. Plaintiff also asks the court to reverse the ALJ’s finding that she can  
27 perform her past relevant work due to an absence of substantial evidence in support thereof. Doing  
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1 so would lead to plaintiff's preferred remedy: remand to the ALJ with orders to calculate the  
2 benefits that plaintiff is due. Defendant, however, asks the court to remand to the ALJ for further  
3 evaluation of plaintiff's residual functional capacity.


4 Absent specific, cogent reasons for discounting them, both the testimony of plaintiff and her  
5 domestic partner are credited as a matter of law. See Moses, 33 Fed. Appx. at 890; Lester, 81 F.3d  
6 at 834. That being so, there is no issue left for further adjudication. The evidence, including the  
7 testimonies of plaintiff and Tamala, unequivocally establishes plaintiff's difficulties engaging in  
8 even the slightest physical exertion. Even viewing plaintiff's extreme physical limitations in the  
9 light most favorable to defendant, there is no question that plaintiff is entirely incapable of  
10 performing her past relevant work. Defendant, rather than rebutting these facts, asks the court for  
11 the opportunity to do so at further hearings before the ALJ. The court is confident that further  
12 proceedings would serve no useful purpose.

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14 CONCLUSION

15 Accordingly, plaintiff's motion for summary judgment is GRANTED, defendant's motion to  
16 remand is GRANTED in part and DENIED in part, and this case is remanded for the calculation  
17 and award of benefits.

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19 IT IS SO ORDERED.

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21 Date: August 30, 2007

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23 MARILYN HALL PATEL  
24 District Judge  
25 United States District Court  
26 Northern District of California  
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**ENDNOTES**

1. All facts are taken from Pl.'s Mot., unless otherwise indicated.
2. The court notes that plaintiff testified that she can sit for twenty minutes at a time, somewhat contradicting the letter from her physician. However, this difference is negligible in that, whether capable of sitting for ten or twenty minutes at a time, the result is clear: plaintiff's ability to work is severely impacted.